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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES RICHARD REYNOLDS, Defendant and Appellant.	G055864 (Super. Ct. No. 14CF1132) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan S. Fish, Judge. Affirmed.

Mark D. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Eric A. Swenson and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

James Richard Reynolds appeals from a judgment after a jury convicted him of deliberate and premeditated attempted murder and four counts of aggravated assault, and found true he personally used a deadly weapon and inflicted great bodily injury. Reynolds argues the following: the trial court erred in instructing the jury on aggravated assault; the prosecutor's error resulted in the jury convicting him of attempted murder based on a legally improper theory; and the matter must be remanded for resentencing. Although a portion of the aggravated assault instruction was inapplicable and the prosecutor misstated the law regarding provocation, we conclude Reynolds was not prejudiced. None of his other contentions have merit, and we affirm the judgment.

FACTS

I. Substantive Facts

A. Reynolds' Attack on Victim

Before noon, Reynolds went to visit K.P. who was staying at D.L.'s house. Reynolds helped K.P. trim a tree for most of the afternoon. S.C. was also there. Later that afternoon, A.K., whose mother also lived at the house, arrived with A.L. (Victim). S.C., A.K., K.P., Victim, and Reynolds smoked methamphetamine.

Just before midnight, K.P. was in the living room watching television when Reynolds walked in and referring to Victim said, "'I don't like that guy[]'" and then left the room. Ten minutes later, Reynolds reentered the living room and said, "'I'm going to fucking knife that guy.'"[1] K.P. asked who Reynolds was talking about, and he replied, "'The guy she's with. He's talking about me.'" Reynolds left, and A.K. walked into the living room and sat down next to K.P. K.P. told A.K. that she should talk with

[1] The evening of the incident, a detective interviewed K.P., who said Reynolds told him that he was going to stab Victim. At trial, K.P. testified Reynolds said he was upset with Victim, but he was not certain he threatened to stab Victim. K.P. admitted his memory of the incident was clearer at the time of the incident, over three years earlier, and Reynolds "might have said it." At trial, A.K. testified K.P. told her that Reynolds said he was going to stab Victim.

Victim because Reynolds "had a problem with him." K.P. told her that Reynolds "planned on stabbing" Victim.

Meanwhile, Victim and S.C. were in the backyard talking and smoking. Reynolds walked outside with his hands in his sweater pockets and asked Victim if he had a problem with him. Victim said, "'No.'" Reynolds said he heard Victim say his name three times. Victim said he did not know Reynolds' name and Reynolds was "'high.'" Reynolds said, "'Oh, okay, okay, that's cool[]'" and Victim started to turn around. Reynolds stabbed Victim once on the ear, once on the neck, and three times on the back. Victim screamed, retreated, and said, "'Oh, fuck, I'm leaking[.]'" Reynolds fled. S.C. walked Victim, who was bleeding profusely, to a nearby hospital; Victim could have died from his injuries.

B. Reynolds' Attack on Family

The following afternoon, E.S. (Wife) was driving her car, her husband (Husband) was in the passenger seat, and her five-year-old child (Child) was in the rear passenger side seat. Wife was waiting to make a left turn but did not proceed when the light turned green because another car was running the red light. She heard someone honking and made the left turn.

After she made the turn, the white sports utility vehicle (SUV) behind her sped up, moved to the right lane, and sped by her. The SUV pulled in front of her car and stopped, cutting her off. A man got out of the SUV holding an open knife with a white handle and silver blade. The man approached the passenger door with the knife and with its blade raised towards the window. The man first tried to open Husband's door and then tried to open Child's door. Another motorist stopped his car and said he was going to call 911. The man got in his SUV and drove away. Later, Wife identified Reynolds from a photographic lineup as the person in the SUV with the knife.

C. Reynolds' Arrest

A week later, an officer conducted a traffic stop of a white SUV because of an outstanding warrant. Reynolds got out of the SUV and identified himself as "Robert Ray Neal." A search of the vehicle uncovered two razor-blade style knives.

II. Procedural Facts

An amended information charged Reynolds with the following: count 1-attempted murder of Victim (Pen. Code, §§ 664, subd. (a), 187, subd. (a), all further statutory references are to the Penal Code); count 2-aggravated assault with a deadly weapon (a knife) on Victim (§ 245, subd. (a)(1)); count 4-aggravated assault with a deadly weapon (a knife) on E. S. (§ 245, subd. (a)(1)); count 5-aggravated assault with a deadly weapon (a knife) on S. S. (§ 245, subd. (a)(1)); and count 6-aggravated assault with a deadly weapon (a knife) on Child (§ 245, subd. (a)(1)).[2] As to count 1, it alleged Reynolds committed the attempted murder with deliberation and premeditation (§ 664, subd. (a)), and he personally used a deadly weapon, a knife (§ 12022, subd. (b)(1)). With respect to counts 1 and 2, it alleged he personally inflicted great bodily injury on Victim (§ 12022.7, subd. (a)). It also alleged Reynolds suffered three prior strikes (§§ 667, subds. (d) & (e)(2)(A), 1170.12, subds. (b) & (c)(2)(A)), two prior serious felonies (§ 667, subd. (a)(1)), and three prior prison terms (§ 667.5, subd. (b)).

At trial, the prosecution offered the evidence detailed above, including Victim's testimony. When the prosecutor asked Victim what immediately proceeded Reynolds' attack, he said the following: "I guess – I don't know. I guess I was talking shit or something, you know, something to that matter."

S.C. testified Victim was standing with his hands at his side when Reynolds attacked him. She stated Victim did not have a weapon in his hands and did not raise his hands at Reynolds or threaten him in any way.

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[2] The amended information did not include a count 3.

Officer Joey Ramirez testified he interviewed K.P., A.K., and S.C. at the police station and those interviews were video recorded. He stated that after he completed those interviews, he left S.C. and A.K. in a room alone and recorded their conversation. On cross-examination, Ramirez agreed the recording was not optimal. The recording was played for the jury. Defense counsel distributed to the jury a transcript of what he thought S.C. told A.K.: "[Victim] handed me his knife. He had me go through his pockets and his hand was covered in blood."

Reynolds testified Victim was respectful when he first met him, although he saw Victim had "OC" tattooed on his face. Reynolds admitted to smoking methamphetamine with Victim and others. At some point, Reynolds heard Victim and A.K. having sex in the garage. He banged on the garage door and told them to be quiet because he thought they were being disrespectful.

Later, Reynolds went into the backyard and smoked a cigarette with Victim and S.C. Reynolds noticed Victim's demeanor had changed and he began speaking and acting like a "gang banger" and this caused Reynolds to dislike him. Reynolds testified he previously spent time in custody and learned how to read people to protect himself. Reynolds went back inside the house, sat down in the living room near some windows, and spoke with K.P.

Reynolds overheard Victim and/or S.C. say his name a couple times and it irritated him. He told K.P., "'Man, I don't trust the guy.'" When Reynolds returned from the restroom, he told K.P., "'I'm going to get at this guy.'" Reynolds testified he meant he was going to talk to Victim, and he denied telling K.P. he was going to stab him.

Reynolds went into the backyard and told Victim "'You should chill out a little bit, you're getting kind of loose.'" Victim said, "'What are you talking about?'" Victim balled up his fist and made "a very angry face." Reynolds said he was the one who banged on the garage door and said he heard them talking about him. Victim moved

towards him and they started fighting. He described it as "a mutual clash[]" of punches and grappling. Victim had him in a headlock and they exchanged profanities.

When Reynolds started to hit him, Victim started pulling something out of his pocket. Reynolds knew Victim had a knife, and after he hit Victim, he grabbed his knife and snapped it open. Victim got his knife out but did not get it open. Reynolds thought Victim was going to stab him and "reacted" by stabbing him in the neck. When Victim lunged at him and tried to grab his arms, Reynolds stabbed him two or three more times. Reynolds testified that before the incident he had been stabbed while he was incarcerated and when he saw Victim's knife, he felt threatened and was in fear of being killed. Reynolds panicked and fled to Long Beach where he threw away his clothes and the knife.

Reynolds admitted he honked his horn at Wife when she did not immediately turn left on the green light. He claimed Wife flipped him off. He accelerated past her car and got in front of her and stopped because the next light was red. Wife honked at him and flipped him off, and Husband raised his hand. Reynolds got out of his SUV and pulled out a box cutter. When he approached Wife's car, he exposed the blade. He stated his intent was to scare them and not to harm them. He denied trying to open the car doors and said he left when he saw the Child in the backseat.

Detective Matthew Moss, a gang expert, testified about the culture and habits of criminal street gangs to support Reynolds' claim of self-defense.

The trial court instructed the jury on the prosecution's burden, the jury's duties, and the offenses and defenses. As relevant here, the court instructed the jury with CALCRIM Nos. 200, 603,[3] 875, and 3515.

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[3] The trial court instructed the jury on provocation in pertinent part as follows: "It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same

During closing argument, the prosecutor asserted Reynolds committed count 1 with deliberation and premeditation. The prosecutor stated there were lesser included offenses but the jury did not need to consider those if it concluded Reynolds was guilty of the charged offenses. Defense counsel argued Reynolds acted in self-defense; he did not argue heat of passion.

During rebuttal, the prosecutor addressed heat of passion, stating the following: "This is not someone maybe saying someone's name is not being provoked. Even if that does count as being provoked, it doesn't mean element 4, which is that '[t]he provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] A person of average disposition would not hear their name being talked about in the backyard and think to themselves, you know what, I am going to stab that guy, equip themselves with a knife and try to kill them." Defense counsel objected as "Outside of the elements." The trial court stated, "Sustained. Outside of your argument." Counsel replied, "Yes."

The jury rejected Reynolds' claim of self-defense, and necessarily disbelieved the evidence Victim had a knife, and convicted him on all counts and found true all the enhancements. The trial court denied Reynolds' motion for new trial, and at a bench trial, the court found true all the priors.

After the trial court struck one of the strikes, the court sentenced Reynolds to 25 years to life on count 1 and a consecutive term of 25 years to life on count 4. The court imposed two consecutive five-year terms on the prior serious felony enhancements and struck for purposes of sentencing the three prior prison enhancements. The court imposed and stayed sentences on counts 2, 5, and 6. As relevant here, when imposing

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situation and knowing the same facts, would have reacted from passion rather than judgment. [¶] If enough time passed between the provocation and the attempted killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the attempted murder is not reduced to attempted voluntary manslaughter on this basis."

and staying a 25 years to life sentence on count 2, the court stated then stated, "plus one year for the [section] 12022[, subdivision] (b), plus three years for the [section] 12022.7, for an aggregate term of 29 years to life." The court stated Reynolds' total prison term was 64 years to life.

DISCUSSION

I. Counts 4, 5, and 6—Aggravated Assault

A. CALCRIM No. 875—Each Element of the Offense

Reynolds argues CALCRIM No. 875 violated his due process right to require the prosecution to prove each element beyond a reasonable doubt. Not so.

"'It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions.' [Citation.] '"A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]" [Citation.] "'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'"' [Citation.]" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 433 (*Bryant*).)

The trial court instructed the jury with CALCRIM No. 875 as follows: "The defendant is charged in [c]ounts 2, 4, 5 and 6 with assault with a deadly weapon other than a firearm in violation of . . . section 245. To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a *person*; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to *someone*; [¶] 4. When the defendant acted, he had the present ability to apply force with a deadly weapon other than a firearm to a *person*[;] [¶] (and as to count 2 only) 5. The

defendant did not act in self-defense (element 5 does not apply to counts 4, 5, or 6.)" (Italics added and internal brackets omitted.)

Relying on the instruction's use of "person" or "someone" and *People v. Velasquez* (2012) 211 Cal.App.4th 1170 (*Velasquez*), Reynolds claims the jury could have convicted him of assaulting all three victims based on his assault of Victim, or, alternatively, based on his conduct toward Wife or Husband. We agree with the Attorney General this is a "hypertechnical" reading of the instruction.

There is no reasonable likelihood that the jury understood CALCRIM No. 875 in the manner Reynolds asserts. There were two separate assaults committed against separate victims at different times and places. Reynolds assaulted Victim at a residence in the City of Orange just before midnight. Reynolds assaulted the family over 12 hours later in the City of Anaheim. It is not reasonably likely the jury convicted Reynolds of assaulting Wife, Husband, and Child based on his assault of Victim.

Nor is it reasonably likely the jury convicted him of assaulting all three victims based on his assaulting Wife or Husband. Reynolds' conduct of displaying the box cutter and trying to first open Husband's door and then Child's door exposed Wife, Husband, and Child to the potential application of force. The amended information charged a separate count as to each named victim. The trial court instructed the jury with CALCRIM No. 3515, which stated the following: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." Finally, the verdict form for each count identified the specific victim. "'We credit jurors with intelligence and common sense [citation] and do not assume that these virtues will abandon them when presented with a court's instructions. [Citations.]' [Citations.]" (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1024.)

Reynolds reliance on *Velasquez, supra*, 211 Cal.App.4th 1170, is misplaced. In that case, the jury convicted defendant of five counts of assault with a firearm committed against five family members. (*Id*. at pp. 1174-1175.) The evidence

established defendant fired multiple gunshots at the garage of the victims' home, but only one family member was present in the garage at the time of the shooting. (*Id*. at p. 1175.) The *Velasquez* court concluded the use of the singular nouns "person" and "someone" in CALCRIM No. 875 was confusing and prejudicial because there were five assault victims but only one of them was in the area of the shooting. (*Id*. at pp. 1176-1177.) The court reasoned, "By following the letter of the instruction, the jury may have found [defendant] guilty of assaulting the other four individuals because firing the shots resulted in a direct and probable application of force to a *person* [the only victim in the garage]." (*Id*. at p. 1177.) Unlike the circumstances in *Velasquez*, here the assaults occurred at different times and different places, and the court instructed the jury to consider each count individually. CALCRIM No. 875 did not implicate Reynolds' due process rights.

B. CALCRIM No. 875—Inherently Dangerous Weapon

Reynolds contends CALCRIM No. 875 presented the jury with a legally invalid theory concerning an inherently dangerous weapon. We disagree.

An object can be a deadly weapon either if it is inherently deadly in the ordinary use for which it was designed or the object is used in a manner likely to produce great bodily injury. (*People v. Aledamat* (2018) 20 Cal.App.5th 1149, 1152-1153 (*Aledamat*).) A box cutter is not an inherently dangerous weapon as a matter of law because it is designed to cut things and not people. (*Id*. at p. 1153.)

Here, the relevant portion of CALCRIM No. 875 provided: "A deadly weapon other than a firearm is any object, instrument or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

As the *Aledamat* court stated, and as the Attorney General agrees, this portion of the instruction while correct in the abstract was inapplicable here because the weapon was a box cutter. (*Aledamat, supra,* 20 Cal.App.5th at p. 1153.) When the trial court presents the jury with both legally valid and legally invalid theories we must

reverse unless there was a basis in the record to conclude the jury based its verdict on the legally valid theory. (*People v. Chiu* (2014) 59 Cal.4th 155, 167; *Aledamat, supra,* 20 Cal.App.5th at p. 1153.)

Here, the record supports the conclusion the jury based its verdicts on counts 4 to 6 on the legally valid theory. During closing argument, the prosecutor referred to the knife when discussing the relevant facts. When discussing the elements of aggravated assault, he referred to the knife as a "deadly weapon" because "it can be used to stab someone." The prosecutor described how Reynolds raised the knife and attempted to open the car doors. Later, the prosecutor said "clearly" the knife "is capable of actually inflicting force[]" and "clearly it had a blade capable of actually stabbing."

During closing argument, defense counsel discussed the elements of aggravated assault. He focused on the third and fourth elements of CALCRIM No. 875, and disputed the application of force and present ability requirements were present. Counsel referred to the knife, but did not dispute the deadly weapon requirement.

During rebuttal argument, the prosecutor stated Reynolds displayed the blade "so that they will be in fear that he is going to stab them with it." Later, he said the following: "It's clearly a deadly weapon. I don't think they dispute that."

Reynolds relies on this last comment to claim the prosecutor argued the box cutter was an "inherently" deadly weapon. First, Reynolds does not cite to any place in the record, and we found none, where the prosecutor stated "inherently" when he referred to the box cutter as a deadly weapon. Second, the prosecutor was accurately highlighting that defense counsel did not argue the box cutter was not a deadly weapon. Third, the prosecutor's arguments concerning the box cutter were limited to the manner in which Reynolds used the box cutter. This was proper. To determine whether an object is used in a manner likely to produce great bodily injury, the jury must consider "'the nature of the object, the manner in which it is used, and all other facts relevant to the issue.' [Citations.]" (*Aledamat, supra,* 20 Cal.App.5th at p. 1153.)

Reynolds reliance on *Aledamat, supra,* 20 Cal.App.5th at pages 1154-1155, where the court reversed an aggravated assault conviction and deadly weapon enhancement, is misplaced because during rebuttal argument the prosecutor referred to the box cutter as "an 'inherently deadly weapon.'" Here, the prosecutor did not refer to the box cutter as an "inherently deadly weapon." The record supports the conclusion the jury based its verdicts on counts 4 to 6 on the legally valid theory.

II. Attempted Murder

A. Guiton/Green

Relying on *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*), and *People v. Green* (1980) 27 Cal.3d 1 (*Green*),[4] Reynolds asserts we must reverse his conviction for count 1 because it is impossible to determine from the record whether the jury based its verdict on an improper theory the prosecutor argued to the jury. Not so.

In both *Guiton* and *Green*, the California Supreme Court held that "'[w]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.'" (*Guiton, supra,* 4 Cal.4th at p. 1122, quoting *Green, supra,* 27 Cal.3d at p. 69.)

In *People v. Morales* (2001) 25 Cal.4th 34 (*Morales*), the California Supreme Court faced the same issue we face here. In that case, the evidence established officers found a vial of phencyclidine (PCP) in the defendant's vehicle and he was under the influence of the drug at the time of his arrest and he was charged with possessing PCP. (*Id*. at p. 37.) During closing argument, the prosecutor argued evidence defendant

[4] *Green* was overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.

was under the influence of PCP was sufficient to establish his possession of the drug when in fact was it was not sufficient proof by itself. (*Id*. at p. 38.)

The California Supreme Court rejected defendant's claim it was impossible to determine whether the jury based its verdict on the improper theory. (*Morales, supra,* 25 Cal.4th at pp. 41-42.) The court opined it would be "an incorrect reading of precedent" to conclude that "because the closing argument is part of the presentation of the state's case, error may arise solely from improper remarks made therein." (*Id*. at p. 48.) The court concluded the following: "*Guiton* and *Green* are unlike this case in that in each of them, *the court* presented the state's case to the jury on an erroneous legal theory or theories. . . . [¶] . . . [¶] In this case, by contrast, *the court* did not present to the jury a case that was premised on a legally incorrect theory. The prosecutor arguably misstated some law, but such an error would merely amount to prosecutorial misconduct [citation] during argument, rather than trial and resolution of the case on an improper legal basis. [¶] When a defendant believes the prosecutor has made remarks constituting misconduct during argument, he or she is obliged to call them to the court's attention by a timely objection. Otherwise no claim is preserved for appeal. [Citation.]" (*Id*. at pp. 43-44, italics added; accord *People v. Nguyen* (2015) 61 Cal.4th 1015, 1046-1047.)

We reach the same conclusion as the *Morales* court. Reynolds' claim is solely one of prosecutorial error and not one of judicial or instructional error. Although he suggests nothing in the trial court's instructions "disabused" the jury of the legally incorrect theory (*People v. Morgan* (2007) 42 Cal.4th 593, 613 [instructions did not disabuse jury of improper legal theory]), Reynolds does not contend CALCRIM No. 603, or any other instruction, was legally erroneous. The trial court properly instructed the jury on provocation as stated in CALCRIM No. 603. (*People v. Beltran* (2013) 56 Cal.4th 935, 949 [provocation evaluated by whether average person would react with reason and judgment obscured].) As we explain below, the prosecutor misstated the law regarding provocation, a point the Attorney General concedes. But contrary to Reynolds'

assertion otherwise, CALCRIM No. 603 did preclude the erroneous standard the prosecutor argued. At most, the error Reynolds asserts amounts to "prosecutorial misconduct [citation] during argument," and not "trial and resolution of the case on an improper legal basis." (*Morales, supra,* 25 Cal.4th at p. 43.)

B. Prosecutorial Error

Reynolds argues the prosecutor committed misconduct when he misstated the law regarding provocation. The Attorney General concedes the prosecutor misstated the law on this point but asserts Reynolds forfeited the claim because he did not obtain a ruling on the objection or request an admonition and the error was harmless. We conclude Reynolds was not prejudiced.

A prosecutor's conduct violates the United States Constitution "when it infects the trial with such unfairness as to make the conviction a denial of due process." (*Morales, supra,* 25 Cal.4th at p. 44.) A prosecutor's conduct violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*Ibid.*) "In either case, only misconduct that prejudices a defendant requires reversal [citation], and a timely admonition from the court generally cures any harm. [Citation.]" (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.)

In *Beltran, supra,* 56 Cal.4th at page 949, the California Supreme Court explained that when assessing whether a defendant is provoked, the defendant's state of mind, not his particular act, is the proper focus. The court added the provocation is evaluated by whether the average person would react with his reason and judgment obscured. (*Ibid.*)

Here, after reciting CALCRIM No. 603's element on provocation, the prosecutor stated, "'A person of average disposition would not hear their name being talked about in the backyard and think to themselves, you know what, I am going to stab that guy, equip themselves with a knife and try to kill them.'" The Attorney General concedes this was error. Although we agree the prosecutor misstated the law, we

conclude Reynolds was not prejudiced. We conclude beyond a reasonable doubt the misstatement did not contribute to the verdict.

Again, the trial court properly instructed the jury on provocation as stated in CALCRIM No. 603. And the court instructed the jury that if the attorney's statements concerning the law conflicts with the court's instructions, the jury must follow the court's instructions. (CALCRIM No. 200.) We presume jurors are intelligent and capable of and apply the trial court's instructions. (*Bryant, supra,* 60 Cal.4th at p. 433.)

Additionally, the jury's verdict Reynolds acted with deliberation and premeditation "is manifestly inconsistent with having acted under the heat of passion" and "clearly demonstrates that defendant was not prejudiced." (*People v. Wharton* (1991) 53 Cal.3d 522, 572 [trial court gave jury "comprehensive instructions on provocation and heat of passion"] (*Wharton*).)

Reynolds asserts this line of reasoning is circular, and attacks *Wharton* on the facts and the law. The reasoning is not circular. The jury's determination Reynolds "carefully weighed the considerations for and against his choice" and "decided to kill before completing his act" establishes he could not have *reacted* with his reason and judgment obscured. Here, like in *Wharton*, the trial court provided the jury with "comprehensive instructions on provocation and heat of passion."

Reynolds relies on *People v. Berry* (1976) 18 Cal.3d 509 (*Berry*), to argue a conviction for first degree murder was not manifestly inconsistent with having acted under the heat of passion. The courts in *People v. Peau* (2015) 236 Cal.App.4th 823, 830-832 (*Peau*), and then *People v. Franklin* (2018) 21 Cal.App.5th 881, 892-894 (*Franklin*), acknowledged and reconciled the tension between *Berry* and *Wharton*.

The *Peau* court explained *Berry* did not discuss the premeditation and deliberation instructions, which this "strongly suggests that the sole issue considered in *Berry* was whether the error was harmless because the jury received some instruction on the concepts of heat of passion and provocation, not whether the error was harmless

because the jury found the murder was willful, deliberate, and premeditated and such a finding was inconsistent with a finding that the defendant acted in a heat of passion." (*Peau, supra,* 236 Cal.App.4th at pp. 831-832.) We conclude the *Peau* court's reasoning persuasive and conclude the circumstances here more closely resemble *Wharton*. (*Franklin, supra,* 21 Cal.App.5th at p. 894.) Reynolds was not prejudiced by the error.

III. Sentencing

Reynolds contends we must remand the matter for resentencing because the oral pronouncement of judgment conflicts with the minute order and abstract of judgment. Remand is unnecessary because the clerk's transcript can be harmonized with the reporter's transcript.

The trial court's oral pronouncement constitutes the court's judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471 (*Mesa*).) Conflicts between the reporter's and clerk's transcripts are generally presumed to be clerical in nature and are resolved in favor of the reporter's transcript unless the particular circumstances dictate otherwise. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *Mesa, supra,* 14 Cal.3d at p. 471.)

As to count 1, the amended information alleged Reynolds personally used a deadly weapon (§ 12022, subd. (b)(1)), and personally inflicted great bodily injury (§ 12022.7, subd. (a)). With respect to count 2, it alleged he personally inflicted great bodily injury (§ 12022.7, subd. (a)).

At sentencing, the trial court did not address the enhancements on count 1. As to count 2, the court stated it was imposing a one-year term for the deadly weapon enhancement and a three-year term for the great bodily injury enhancement on count 2. But the amended information did not allege a deadly weapon enhancement as to count 2.

Both the abstract of judgment and minute order reflect that on count 1, the trial court sentenced Reynolds to one year for the deadly weapon enhancement and three years for the great bodily injury enhancement. The abstract of judgment and minute

order also reflect that on count 2, the trial court imposed three years for the great bodily injury enhancement and stayed the sentence pursuant to section 654.

We are confident the trial court unintentionally failed to pronounce sentence on count 1. The court's comments lead inescapably to the conclusion that it intended to impose the sentence on count 1 that it imposed on count 2. Although the oral pronouncement of judgment ordinarily controls, based on the record before us we conclude the clerk's transcript can be harmonized with the court's oral pronouncement of judgment. Thus, the court's minute order and abstract of judgment represent the court's sentence, and they control.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

GOETHALS, J.